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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 147

HARRY PORTNOY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 99-103; Pet. 7-11) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1963 (R. 104; Pet. 12). The petition for a writ of certiorari was filed on May 21, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an indictment charging in the words of 18 U.S.C. 111 that petitioner assaulted a deputy marshal "on account of the performance of his official duties" adequately alleged that the petitioner knew the victim was an officer engaged in the performance of official duties.

STATUTES INVOLVED

18 U.S.C. 111 provides:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. 1114 provides in pertinent part:

> Whoever kills * * * any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, * * * while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished * * *.

STATEMENT

An indictment returned in the United States District Court for the District of Massachusetts charged,

inter alia, that petitioner at a specified time and place "did forcibly assault, * * * United States Deputy Marshal William H. Baldwin, * * * while said * * * Baldwin was engaged in the performance of his official duties and on account of the performance of his official duties, all in violation of Title 18, United States Code, Section 111" (R. 3). A motion to dismiss the indictment was denied after a hearing (R. 3, 4). After trial by jury, petitioner was found guilty. He was sentenced to imprisonment for three months and to pay a $1,000 fine (R. 95-96). The court of appeals affirmed.

The facts are not in dispute. We adopt, as has petitioner (Pet. 3-4), the following statement of the government's evidence made by the court below:

> At the trial the Government offered testimony that the defendant had virtually run over—with his automobile—a Deputy United States Marshal who had tried to serve him with a subpoena. There was evidence from which a jury could have properly concluded that the defendant had been made aware of the official status of the Deputy Marshal and that he had deliberately plunged his car forward—heedless of the possibility of bodily harm to the Marshal—in order to avert being served.

Petitioner testified that he did not know the marshal's identity and thought he was being robbed (R. 64-65).

The court instructed the jury that it would be justified in finding petitioner not guilty if it believed his story that he did not know the man who ap-

proached him was an officer. The court stated (R. 92):

> Now, the statute does not say knowingly, but it might just as well say it because the courts interpret any statute that says this to mean that he would have to know that the man with the paper and the gun was a deputy marshal. And the statute means that that he must know, that it must be knowingly, because every crime on the books presupposes an intent to do the act that is a crime. And so that intent can't be complete, in the statute in this case, unless the man in the car in this case knew that the oth fellow was a Deputy Marshal. So for all intents and purposes, he must have known it before he could be convicted.

ARGUMENT

This case does not present the issue whether knowledge of the official character of the officer assaulted is an essential element of the offense.[1] The trial court unequivocally instructed the jury that it could not convict unless it found that petitioner knew that the man he assaulted was a deputy marshal. It is not questioned that the finding of guilty knowledge was supported by the evidence. Cf. *Bennett* v. *United States*, 285 F. 2d 567 (C.A. 5), certiorari denied, 366 U.S. 911.

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[1] See *McNabb* v. *United States*, 123 F. 2d 848 (C.A. 6), reversed on other grounds, 318 U.S. 332; *Hall* v. *United States*, 235 F. 2d 248 (C.A. 5); *Hargett* v. *United States*, 183. F. 2d 859 (C.A. 5); *United States* v. *Combs*, 73 F. Supp. 813 (E.D. Ky.).

The claim of error here is predicated upon the technical argument that the indictment did not specifically recite knowledge. The indictment, however, in the words of the statute, alleged that the assault occurred while Baldwin was "engaged in the performance of his official duties", and "*on account of the performance of his official duties*" (emphasis supplied). If one does an act "on account of" the performance of official duties by another, he must necessarily know that official duties are being performed by an official. Hence the indictment did sufficiently apprise petitioner of the charge he was required to meet.

This Court in *Pettibone* v. *United States*, 148 U.S. 197, 206, on which petitioner relies, said, with respect to a charge of conspiracy to obstruct the due administration of justice, that an indictment "must charge knowledge or notice, or set out facts that show knowledge or notice". The indictment in this case meets this test.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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